TO: Office of Court Administration

FROM: New York State Bar Association's Commercial and Federal Litigation Section

DATE: May 29, 2015

RE: The Advisory Council's Proposal Concerning New Commercial Division Rule and Amendment of Commercial Division Rule 11-d, Relating to Depositions of Entity Representatives

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The Commercial and Federal Litigation Section ("***Section***") is pleased to submit these comments in response to the Commercial Division Advisory Council's Memorandum dated April 7, 2015, recommending adoption of a new Commercial Division Rule (22 NYCRR §202.70[g]) relating to depositions of entity representatives (the "***Proposal***").

I. EXECUTIVE SUMMARY

The Section agrees that it is desirable to incorporate some of the procedures found in Federal Rule of Civil Procedure 30(b)(6) with respect to the identification of entity representatives for depositions, consistent with the existing requirement of CPLR R 3106(d) for the entity to designate the witness it will produce. The Section also agrees that is appropriate to make clear that the presumptive limit on the length of the examination of the entity will apply regardless of the number of designated entity witnesses, unless the parties agree otherwise or the Court enlarges the duration under the generous "leave shall be freely granted" standard.

II. SUMMARY OF PROPOSAL

The Proposal has two components; first, it enhances the procedure under CPLR R 3106 by adding the "subject matter" to the identification, description or title method of selecting an entity witness. The second component makes clear that the entity deposition is subject to the durational limit established by Rule 11-d, subject to a liberal enlargement of the seven hour limit by agreement of the parties or request to the Court "which shall be freely granted."

III. RESPONSE AND DISCUSSION

CPLR R 3106 permits a party to notice a deposition of an entity by identifying, describing or providing the title of the desired witness. The Proposal enhances the practice under the existing rule by permitting the noticing party to enumerate the matters upon which the entity representative is to be examined, requiring that the matters be described with reasonable particularity. This substance based designation is very useful for obvious reasons.

Consistent with the existing requirement of CPLR R 3106, the producing party may produce the identified witness or designate another person, and must identify the alternate witness. The identification of the alternate is not required by Federal Rule of Civil Procedure 30(b)(6).

The Proposal also benefits from incorporating the requirement that the producing party set out the matters on which each witness will testify, if the producing party designates more than one witness in response to the notice.

The Section finds paragraph (g) of the Proposal a welcome addition as it captures the circumstance where a party designates as a witness a person who is not an officer, director, member, employee or managing or authorized agent of a party at the time the testimony is given.

There is a typographical error in paragraph (d), subparagraph b. The word "identify" should be "identity".

The Section supports the amendment to Rule 11-d in respect of assuring that the use of subject matter to identify an entity witness or witnesses is not used to avoid the durational limit of seven hours. The ability to seek enlargement of the time limit under the "shall be freely granted" standard, assures judicial review and thus an opportunity for discussion and a flexible and measured response.

NEW YORK CITY BAR

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REPORT BY THE COUNCIL ON JUDICIAL ADMINISTRATION, COMMITTEE ON STATE COURTS OF SUPERIOR JURISDICTION AND COMMITTEE ON LITIGATION

COMMENTS ON PENDING PROPOSALS FROM THE COMMERCIAL DIVISION ADVISORY COUNCIL

These comments reflect the input of the City Bar's Council on Judicial Administration, Committee on State Courts of Superior Jurisdiction and Committee on Litigation.

1. **Proposed adoption of new Commercial Division Rule and amendment of Commercial Division Rule 11-d, relating to depositions of entity representatives.**

The City Bar supports the objective of the proposed Rule concerning entity designees, which is to reduce the likelihood of a mismatch between the information sought and the witness produced. However, the City Bar questions whether an amendment of the Commercial Division Rules is necessary to achieve this objective.

The permissive, rather than mandatory, language of the proposed Rule makes it unnecessary in light of existing practice under the CPLR and the case law. A party desiring to depose a specific corporate representative may designate such person in the deposition notice under CPLR 3106(d). Further, CPLR 3107 already permits a party desiring to take the deposition of an entity representative to enumerate the matters upon which the person is to examined, and, as the Advisory Council points out on page seven of its memorandum, the case law imposes an obligation on the entity being deposed to tender a knowledgeable witness. Thus, the proposed Rule adds nothing to the procedures already provided by the CPLR and developed under case law.

The City Bar is also concerned about the complexity of the proposed Rule. The multiple subsections and sub-subsections make the Rule difficult to understand and could lead to confusion and disputes over issues that are now settled.

The dissent among City Bar members supports the proposed Rule, believing that a single rule rather than a procedure derived from multiple sources will provide better guidance to attorneys. The dissent is not concerned about the permissive language of the proposed Rule, because, as with any other discovery device, a party may elect to utilize the proposed Rule or may elect to forego it. In addition, the dissent believes the requirement that an entity identify the

witness it will tender prior to the deposition (even if no specific witness is named in the notice) would allow litigants to be better prepared.

The Advisory Council also proposes to amend recently adopted Commercial Division 11-d, which presumptively limits depositions to seven hours. The proposed amendment would limit the deposition of an entity to seven hours in total, irrespective of the number of constituent witnesses. The City Bar opposes this amendment. A seven hour limit is too restrictive for a corporate entity that provides information through multiple representatives. Each representative will provide information about different aspects of the case, and each examining party should be allowed to explore these aspects fully. This is especially true for cases in the Commercial Division, which frequently involve complex factual and legal issues. Further, the proposed amendment will impose the unnecessary burden on the examining party to obtain consent or apply to the court for an enlargement of this limit, creating the added burden of motion practice.

This amendment also has some dissenting City Bar members who believe a presumptive seven-hour limit would encourage better preparation and more focused questioning of entity representatives, leading to fewer multi-day depositions and thereby decreasing costs.

2. **Proposed amendment of Preamble to the Rules of the Commercial Division relating to proportionality in discovery.**

The City Bar favors proportionality in discovery and supports the proposed amendment to reaffirm in the Preamble to the Commercial Division Rules the guiding principle of proportionality in the conduct of discovery in the Commercial Division. However, a significant number of members are concerned that the term 'proportionality' is not sufficiently well-defined and would favor a more specific definition of the standard.

3. **Proposed amendment of 22 NYCRR § 202.70(b) and (c), relating to eligibility criteria for matters that may be heard in the Commercial Division.**

The City Bar supports the proposed amendment to add a monetary threshold for arbitration cases (except international arbitrations) in the Commercial Division. The City Bar supports the proposed amendment to exclude home improvement contract cases involving residential properties, but notes that the proposed rule does not reflect the Advisory Council's stated intent in the memorandum, which is not to exclude renovations contracted for by the owner of a rental property, a co-op board or a condominium board. The proposed rule as drafted does not address this exception.

4. **Proposed new Model Status Conference Order Form for use in the Commercial Division.**

The City Bar opposes the use of the model status conference form because it does not believe it will help accomplish the goal of expediting the litigation process. Instead, the burdensome requirements of the form will impose unnecessary legal fees on litigants without providing substantial value at status conferences. The status conference form should primarily focus on identifying the outstanding discovery issues between the parties, rather than cataloging

the parties' progress as to each facet of the preliminary conference form. The proposed form also assumes that the assigned Commercial Division justice knows nothing about the case, when in fact the assigned justice should be familiar with the issues and the parties by the time of the status conference.

June 2015

THE NEW YORK CITY LAW DEPARTMENT'S COMMENTS ON THE PROPOSED AMENDMENTS TO THE COMMERCIAL DIVISION'S RULES

The New York City Law Department (the "Law Department") respectfully submits the following comments on the proposed amendments to the Commercial Division Rules concerning depositions of entity representatives. In summary, the Law Department: supports Proposed Rule #1, except for subsection (f); and opposes paragraph 3 of Proposed Amendment #2 (it takes no position as to paragraphs 1 and 2 of Proposed Amendment #2).

I. Proposed Rule #1

The City handles a large volume of cases in the Commercial Divisions across all five boroughs. Commercial cases are often complex and require extensive discovery, including depositions of several witnesses from each entity that is a party in the litigation. We are very much in favor of measures designed to make the handling of entity depositions more efficient.

Accordingly, we support Proposed Rule #1 (the "Proposed Rule"), which should help save time and litigation costs by encouraging parties to produce only relevant and informed entity witnesses for depositions, particularly where the party desiring to take the deposition does not know which entity representative it seeks to examine, but is able to set forth with specificity the intended subject matter(s) of the deposition (a scenario addressed in subsection (c) of the Proposed Rule that is not currently addressed by CPLR 3106(d)).

However, the Proposed Rule, as written, raises certain concerns which we discuss below.

First, while Proposed Rule subsection (d) appears to more or less mirror CPLR 3106(d), it contemplates a deposition notice that "name[s]" the individual sought to be examined, whereas CPLR 3106(d) requires that the notice provide the "identity, description or title" of such

individual. It is unclear if this is in fact a difference, or if the "name" referenced in subsection (d) of the Proposed Rule is intended to equate with the "identity, description or title" referenced in CPLR 3106(d). For example, if a notice describes an entity representative by his title and enumerates the matters upon which it seeks to examine him, it is unclear whether the indication of his title is deemed to "name" the individual, so that the notice fits under subsection (d) of the Proposed Rule, or whether it instead fits under subsection (c) of the Proposed Rule (which applies where the individual sought to be examined is *not* "named"). We believe this should be clarified.

There is also a concern that in cases where the notice includes subject matter enumeration, the deponent's attorney will insist that the requesting party be limited in his deposition questioning to only those matters specifically enumerated in the deposition notice. To avoid needless multiplicity of depositions, we urge the Committee to make it clear that a witness produced in response to a notice enumerating expected subject matter(s) is required to testify as to all relevant subjects within his scope of knowledge, including, but not limited to, those subjects specifically enumerated in the deposition notice, unless the witness already has been deposed with respect to the enumerated matters in another capacity.[1]

The Law Department opposes subsection (f) of the Proposed Rule, which requires an entity witness to testify about all information known or reasonably available to the *entity*, rather than to testify solely based on his own personal knowledge. Although the Proposed Rule mirrors Federal Rule 30(b)(6) (the Advisory Committee Notes to the amendment to Rule

[1] Rule 11-d, subsection (d), makes a distinction between the deposition of an officer, director, principal or employee of an entity as a "fact witness, as opposed to an entity representative pursuant to CPLR 3106(d)." Paragraph 2 of Proposed Amendment 2 (discussed in Section II below) would delete the reference to CPLR 3106(d), but otherwise Proposed Amendment 2 retains subsection (d) of Rule 11-d.

30(b)(6) state that its purpose was to "curb the 'bandying' by which officers or managing agents of a corporation are deposed in turn but each disclaims knowledge of facts that are clearly known to persons in the organization and thereby to it"), we do not believe the addition of such a Commercial Division rule is advisable. The Law Department has observed that it is often not feasible in a commercial action for each individual entity representative who is examined to know all of the information known or available to the entity with respect to the (often multiple) issues in dispute. This is particularly true of representatives of government agencies, which are vast entities with numerous departments, and where specific functions and roles are often limited and circumscribed.

Moreover, relying upon what amounts to hearsay testimony rather than first-hand accounts does not make sense in most commercial cases. Unlike in Federal civil rights actions, for example, where 30(b)(6) depositions might be efficient tools for plaintiffs seeking historical information to support alleged "pattern and practice" claims against a municipality, commercial disputes most frequently focus on specific transactions and contracts, in which multiple individuals – who could, and should, be called as witnesses – were directly involved.

The Law Department also has concerns about how the term "reasonably available" in subsection (f) of the Proposed Rule will be construed with respect to government agencies. For example, City agencies often retain construction managers (which are third parties) to assist in construction contract management. While information gathered by the construction manager may be "available" to the City upon request, that information is generally far beyond the scope of knowledge of the agency (and the agency's employees) that retained the construction manager. Further, within a particular City agency, various units are responsible for completely separate functions and there is not one person who has expertise in all of the

disparate functions performed by that agency. For example, on a construction project, an agency may have field staff who are responsible for oversight and inspection of the physical work, office staff responsible for administrative functions (such as generation of change orders or processing of payment requests), and the Engineering Audit Office which is responsible for auditing the work of both field and administrative staff. As construction cases encompass multiple issues and disputes, it is unreasonable to expect a single person to master information pertaining to areas in which she or he lacks experience and expertise.

We propose retaining the traditional state court practice of requiring an individual who is produced on behalf of an entity to testify solely based on his own personal knowledge, and not as to matters known or reasonably available to the entire entity for which he works. Therefore, we propose revising subsection (f) to provide: "The individual(s) designated must testify about information known to the individual(s), including without limitation with respect to the subject matter(s) specifically enumerated in the notice of deposition for which such individual(s) was designated to testify by the entity."

II. **Proposed Amendment #2**

The Law Department opposes paragraph 3 of Proposed Amendment #2 (the "Proposed Amendment"), which would apply the seven-hour durational limit to depositions of an entity, regardless of how many individuals are called to testify on that entity's behalf. In most complex commercial cases handled by the City, multiple individuals from each party have to be called to testify as to the limited matters within each witness's scope of knowledge. Many plaintiffs who sue the City in the Commercial Division are large corporations, with a division of labor (for instance, between field management and office management at a large construction

company), making it necessary that multiple witnesses on behalf of the corporate plaintiff be examined. A presumptive limitation of the total deposition time in construction and other complex, multi-million dollar commercial litigations to seven total hours per entity is unrealistic. (It also is inconsistent with the Notes of Advisory Committee on the 2000 Amendments to subdivision (d) of Fed. R. Civ. P. 30, which state that "the deposition of each person designated under Rule 30(b)(6) should be considered a separate deposition" for purposes of the rule's durational limit.) Paragraph 3 of the Proposed Amendment is likely to lead to more disputes and motion practice, prolonging rather than expediting the time to complete discovery.

If paragraph 3 of the Proposed Amendment is to be adopted, the Proposed Amendment should make clear that the seven-hour limitation applies only to depositions of individuals on behalf of an entity in the manner contemplated by Fed. R. Civ. P. 30(b)(6), and not as "fact witness[es]"[2] (mirroring the distinction made in federal practice). While subsection (d) of Rule 11-d arguably makes that distinction clear, the reference in proposed new subsection (e) to subsection (a)(2), which in turn refers to depositions of "deponents," might create ambiguity.

[2] See subsection (d) of Rule 11-d.

[redacted]

From: Eugene H. Goldberg <ehg@gdblaw.com>
Sent: Wednesday, April 08, 2015 2:01 PM
To: rulecomments
Subject: Proposed Commercial Division Rule X

I propose an addition to Commercial Division Rule X, subpart (i).

The designation of an individual under Rule X(c) or X(d) is a representation that the individual has a basis to testify or that he/she will have acquired knowledge (by preparation and study of records, documents, and communications with others) to testify on the sufficiently designated subject matter.

If an entity makes a designation under Rule X(c) or X(d)(a) :

(1) frivolously (as defined in subpart 130-1) that such individual has a basis to testify on the sufficiently designated subject matter; or
(2) that such individual will acquire by preparation and study of records, documents, and communications with others knowledge of the sufficiently designated subject matter; or
(3) the deposition, cross-examination, and statements made under oath by the individual in such deposition, show the individual had neither such personal knowledge nor had he/she acquired knowledge (by preparation and study of records, documents, and communications with others) of the sufficiently designated subject matter, nor had he an excuse for not having such knowledge;

the Court, may on a party's duly noticed motion, award the costs of the deposition, the attorney's time in the deposition, and/or the expense attorney's fees and costs of the motion, as against the entity.

This proposal is intended to avoid the tactic of designating a person without knowledge for the deposition who answers that he has neither knowledge nor information sufficient to form a belief to answer the questions asked. This allows the entity to present another individual for a second deposition having learned of the questions.

The proposal requires that the subject matter must be sufficiently designated so as to prevent gamesmanship when noticing the deposition of the entity.

This proposal also covers the situation of a person being designated for the deposition who does not adequately prepare for the deposition.

The proposal provides the deposition transcript will contain the information necessary for the court to determine whether the individual had a basis for testifying, either by personal knowledge or else by acquisition. If an individual cannot adequately testify, he will be encouraged to sate the basis for his designation as part of the deposition transcript, or else to state his excuse for his inability to testify.

The court, may on a party's motion, grant relief for the injury incurred. The proposal does not contemplate a court granting relief sua sponte.

This comment is the writer's own views, not the views of his law firm.

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